Abd Razak bin M Abd Karim & Ors v Deras Cemerlang Sdn Bhd

HIGH COURT (MELAKA) — CIVIL SUIT NO MA-22NCvC-60–11 OF 2017
MAIDZUARA MOHAMMED JC
12 JANUARY 2021

Contract — Agreement — Joint venture agreement ('JVA') — JVA entered into between plaintiffs and defendant in relation to development of land — Plaintiffs entitled to 18% of total sales value of project — Whether plaintiffs' entitlement of total sales value of project to be determined based on 'actual selling prices' — Whether plaintiffs' entitlement could be reduced — Whether plaintiffs established claim for damages against defendant

The plaintiffs were the registered proprietors of a piece of property. The defendant was a developer. The plaintiffs and the defendant were parties to a joint venture agreement ('JVA') where the parties agreed to develop the plaintiffs' property ('the project'). The parties agreed that the plaintiffs' entitlement was 18% of the total sales value of the project. Under the JVA, firstly the layout plan for the project was approved by the relevant authority. Secondly, the defendant gave notice in writing to the plaintiffs that the layout plan for the project had been approved and lastly the plaintiffs selected the proposed subdivided building lots that they were entitled to receive and on which the defendant had agreed and undertaken to build the houses on the proposed subdivided building lots in the manner and extent specified in cl 4.04 of the JVA. With regard to the plaintiffs' entitlement, the plaintiffs chose 13 units from the project. The plaintiffs alleged that, among others, the value of the 13 units which they chose did not represent 18% of the total sales value of the project. As an alternative defence, the defendant pleaded that the plaintiffs' entitlement was not 18% but rather 17% of the total sales value of the project.

Held, allowing the claim in part:

(1) The bargain struck between the plaintiffs and the defendant that 'the 18% from the total sales value of the project' was from the total sales value at the stage when the layout plan was approved. As at 18 April 2012 by a letter where the defendant confirmed the plaintiffs' selection of the 13 units, and as prescribed under the terms and conditions of the JVA, the plaintiffs' entitlement under the JVA was resolved. The request by the plaintiffs claiming to rely on Section IV of the Schedule to the JVA, stated that the defendant 'had not provided [the plaintiffs] with documentary

proof of actual selling prices of all the respective units offered for sale to the prospective purchasers/purchasers' was misconceived. With regard to the plaintiffs' entitlement of 18% of the total sales value of the project, the terms and condition of the JVA did not stipulate that the plaintiffs' entitlement was to be determined based on the 'actual selling prices of all the respective units offered for sale to the prospective purchasers/purchasers'. The words '… all the said hereinafter mentioned …' did not mean '… after [the defendant] getting the building plan and developer's license and advertisement permit'. The words '… all the said approval hereinafter mentioned …' referred to the approval of the layout plan. The plaintiffs' reliance on a document titled 'Borang F Perakuan Siap dan Pematuhan' was in error as this document was issued very much later than the stage when 'the layout plan for the project' was approved by the relevant authority which was the triggering event for the computation of the plaintiffs' entitlement under the JVA (see paras 11, 32, 41–42, 54–55 & 66).

(2) In the JVA, there were no provisions for any adjustment, whether an increase or a reduction, of the plaintiffs' entitlement. In this respect, the provisions of cl 6.04 of the JVA did not apply (see para 94).

(3) There was no material before the court that there were 'unforeseen contingencies aforementioned' and as to the date of the 'commencement of constructions'. Therefore, the computation of the time period in Section IX of the First Schedule of the JVA could not be undertaken by the court. The JVA also did not provide a formula for the computation of damages under cl 6.02 of the JVA. The plaintiffs did not call or tender any evidence, whether oral or documentary, regarding the plaintiffs' claim for damages. The plaintiffs had not discharged the legal burden on them and had not established their claim for damages against the defendant (see paras 98, 100–102 & 107–108).

[Bahasa Malaysia summary

Plaintif adalah pemilik berdaftar bagi sebidang hartanah. Defendan adalah seorang pemaju. Plaintif dan defendan adalah pihak dalam perjanjian usaha sama ('JVA') di mana pihak-pihak bersetuju untuk membangunkan hartanah plaintif ('projek'). Pihak-pihak bersetuju bahawa hak plaintif adalah 18% daripada jumlah nilai jualan projek. Di bawah JVA, pertama sekali pelan susunatur untuk projek tersebut telah diluluskan oleh pihak berkuasa yang berkenaan. Kedua, defendan memberi notis secara bertulis kepada plaintif bahawa pelan susunatur untuk projek itu telah diluluskan dan akhir sekali plaintif memilih lot bangunan dibahagikan yang dicadangkan yang mereka berhak terima dan di mana defendan telah bersetuju dan berjanji untuk membina rumah atas lot bangunan dibahagikan yang dicadangkan mengikut cara dan takat yang dinyatakan dalam klausa 4.04 JVA. Berkenaan dengan hak plaintif, plaintif memilih 13 unit daripada projek tersebut. Plaintif mendakwa,

A antara lain, nilai 13 unit yang mereka pilih tidak mewakili 18% daripada jumlah nilai jualan projek itu. Sebagai pembelaan alternatif, defendan memplid bahawa hak plaintif bukan 18% sebaliknya 17% daripada jumlah nilai jualan projek.

B **Diputuskan**, membenarkan sebahagian daripada permohonan:

(1) Perundingan yang dibuat antara plaintif dan defendan bahawa '18% daripada jumlah nilai jualan projek' adalah daripada jumlah nilai jualan pada peringkat apabila pelan susunatur telah diluluskan. Pada 18 April C 2012 melalui surat di mana defendan mengesahkan pemilihan plaintif bagi 13 unit, dan seperti yang ditetapkan di bawah terma dan syarat JVA, hak plaintif di bawah JVA telah diselesaikan. Permintaan plaintif yang mendakwa bergantung pada Seksyen IV Jadual JVA, menyatakan bahawa defendan 'had not provided [the plaintiffs] with documentary proof of D actual selling prices of all the respective units offered for sale to the prospective purchasers/purchasers' adalah salah anggap. Berkenaan dengan hak plaintif sebanyak 18% daripada jumlah nilai jualan projek, terma dan syarat JVA tidak menetapkan bahawa hak plaintif ditentukan berdasarkan 'actual selling prices of all the respective units offered for sale E to the prospective purchasers/purchasers.' Perkataan '... all the said hereinafter mentioned ...' tidak bermaksud '... after [the defendant] getting the building plan and developer's license and advertisement permit'. Perkataan '... all the said approval hereinafter mentioned ...' merujuk kepada kelulusan pelan susunatur. Kebergantungan plaintif F terhadap dokumen bertajuk 'Borang F Perakuan Siap dan Pematuhan' adalah silap kerana dokumen ini dikeluarkan lebih lewat daripada peringkat 'pelan susunatur projek' diluluskan oleh pihak berkuasa yang berkenaan yang merupakan peristiwa pencetus untuk pengiraan hak plaintif di bawah JVA (lihat perenggan 11, 32, 41–42, 54–55 & 66).

G (2) Dalam JVA, tiada peruntukan bagi apa-apa pelarasan, sama ada penambahan atau pengurangan, hak plaintif. Dalam hal ini, peruntukan klausa 6.04 JVA tidak terpakai (lihat perenggan 94).

(3) Tiada material di hadapan mahkamah bahawa terdapat 'unforeseen H contingencies aforementioned' dan mengenai tarikh 'commencement of constructions'. Oleh itu, pengiraan tempoh masa dalam Seksyen IX Jadual Pertama JVA tidak dapat dilakukan oleh mahkamah. JVA juga tidak menyediakan formula untuk pengiraan ganti rugi di bawah klausa 6.02 JVA. Plaintif tidak memanggil atau mengemukakan apa-apa I keterangan, sama ada lisan atau dokumentari, berhubung tuntutan plaintif untuk ganti rugi. Plaintif tidak melepaskan beban undang-undang ke atas mereka dan tidak membuktikan tuntutan ganti rugi mereka terhadap defendan (lihat perenggan 98, 100–102 & 107–108).]

Cases referred to

Foong Seong Equipment Sdn Bhd (receivers and managers appointed) v Keris Properties (PK) Sdn Bhd and another appeal [2013] 2 MLJ 361; [2011] 2 AMR 473, FC (refd)
Mulpha Pacific Sdn Bhd v Paramount Corp Bhd [2003] 4 MLJ 357, CA (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360, HC (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)

Legislation referred to

Housing Development (Control and Licensing) Act 1966

Tan Jee Sern (Shukor Baljit & Partners) for the plaintiffs.
KP Ng (KP Ng & Amardas) for the defendant.

Maidzuara Mohammed JC:

INTRODUCTION

[1] The plaintiffs are the registered proprietors of a piece of property. The defendant is a developer.

[2] The plaintiffs and the defendant are parties to a joint venture agreement dated 28 March 2011 where the parties agreed to develop the plaintiffs' property ('project').

[3] Under the terms and conditions of the joint venture agreement, the parties agreed that the plaintiffs' entitlement is 18% of the total sales value of the project. With regard to the plaintiffs' entitlement, the plaintiffs chose 13 units from the project.

[4] The dispute between the parties centre around the amount representing the plaintiffs' entitlement of 18% of the total sales value of the project. The plaintiffs allege that, among others, the value of the 13 units which they chose do not represent 18% of the total sales value of the project.

THE JOINT VENTURE AGREEMENT ('JVA')

[5] The material terms and conditions of the JVA are set out in the following paragraphs:

3.01 Consideration

(a) In consideration of the sum of money mentioned in section IV of the first schedule below to be paid by the Developer to the Landowners as deposit and in further consideration of the respectative agreements undertakings

and obligations of the parties hereto as hereinafter contained, the Landowners hereby agrees to allow the Developer to undertake the said Project on the Land upon the terms and conditions hereinafter contained.

(b) The landowners shall be entitled to the number of houses/premises or percentage of houses/premises stated in section V of the first schedule after less the Deposit mentioned in section IV of the first schedule hereto for his own use and benefit absolutely of all the subdivided building lots arising out of the conversion of and subdivision of the land, pursuant to the Developer obtaining all the said approval hereinafter mentioned while the Developer shall be entitled to all the remaining of the subdivided building lots compromised in the Project and not belonging to the Landowners for their own use and benefit absolutely and the Landowners shall transfer the ownership of the same to the Developer and or its nominee(s) or as it shall direct a the costs and expenses of the Developer when the titles to the subdivided building lots are issued by the appropriate authority.

(c) In respect of the subdivided building lots belonging to the Landowners as heretofore provided, the Developer shall at its own costs and expenses and in a substantial and workmanlike manner erect for the Landowners such number of houses/premises as shall be equivalent to the number of units as stated in section V of the first schedule after less the Deposit paid herein of every type of houses to be constructed in the Project PROVIDED the Developer of such units or houses shall be permitted by the relevant authority abd shall in all respects conform with the layout plans, building plans and drawings and specifications prepared by the Developer's architect and approved by the relevant authority and of such standard of workmanship and quality of material as the other houses of similar type or design erected or constructed in the Project by the Developer.

3.02 Selection Of Landowner's Houses

Upon the approval of the layout plan (together with all amendments thereto (If any)) by the relevant authority, the Developer shall forthwith give notice in writing of the same to landowners and the Landowners shall forthwith selects such of the proposed subdivided building lots to which he is entitled to receive and on which the Developer has agreed and undertake to build the houses thereon in the manner and extent specified in clause 4.05 hereof, such selection must however first meet with the approval of the Developer, the lots to be selected by the Landowners shall be grouped together and fair regard and consideration must be given to the percentage referred to in clause 3.01 hereof when selecting corner lots. In the event of any dispute arising as to the selection of the subdivided building lots by the Landowners, the dispute shall be referred to a person mutually acceptable to both parties whose decision shall be final and binding upon the parties hereto.

4.05 Time For Completion Of And Obtaining Certificate Of Fitness For Landowner's House

(a) The developer shall diligently proceed with and complete the Landowner's house located in the place on which development is taking place in a good and workmanlike manner and in compliance with generally recognized building standards and practices and in accordance

with the Building Plans and Specifications within the time stated in section IX of the first schedule from the date construction works commenced PROVIDED ALWAYS if in the opinion of the Developer's architect completion of the Landowner's house is delayed by reason of inclement weather civil commotion force majeur or shortage of building materials then in any such cases, the Developer's architect shall make a fair and reasonable time for completion of the Landowner's house.

(b) Valid and registrable Memorandum of Transfer to the Developer's houses duly executed by the Landowner in favour of the Developer or its nominee or nominees together with the usual stamp duty proforma.

6.02 Completion Of Landowner's Houses

If the Developer shall fail to complete the Landowner's houses and deliver the same to the Landowner within the said period stated in Section IX of the First Schedule from the date of commencement of construction works unless completion of the same by that date is prevented as result of unforeseen contingencies aforementioned, the Developer hereby agrees with the Landowner that the Developer shall pay to the Landowner damages.

6.08 Developer To Decide On Layout, Building Plans And Specifications

(a) The Developer's shall have the sole and absolute discretion to decide on the proposed layout plan, building plans and specifications together with the right to accept reject or appeal against any conditions or restrictions that may be imposed by the appropriate authorities.

(b) In the event of the appropriate authorities requiring the Developer to make amendments or alterations to the Building Plans and Specifications the same shall not vitiate this Agreement in any way whatsoever.

(c) The Developer is not bound and shall be under no obligations to carry out any deviations or alterations or extra work on the Landowner's houses as may be required by the Landowner, and the Landowner shall not be entitled to alter or deviate from the Building Plans And Specifications nor shall he be entitle unilaterally to require the Developer to or to engage any other person firm or company to do any additional or other works to the Landowner's houses unless and until a Certificate of Fitness for Occupation in respect of the same have been issued. However, the Developer may, on the written request of the Landowner, at the Developer's sole discretion agree to carry out such alterations, deviations or extra work if these do not involve or require the amendment of the approval Building Plans or the Submission of further plans, the costs and expenses of such alterations, deviations and extra works as quoted by the developer shall have to be paid by the Landowner to the Developer.

The First Schedule

Section	Item	Particulars
IV	Deposit/Advance	RINGGIT MALAYSIA: EIGHTY THOUSAND (RM80,000.00) ONLY payable in the following manner:-

		a) A sum of RINGGIT MALAYSIA: FORTY THOUSAND (RM40,000.00) ONLY payable upon signing of this Agreement. b) A sum of RINGGIT MALAYSIA: FORTY THOUSAND (RM40,000.00) ONLY shall be paid to the Landowner's Solicitors as stakeholders upon signing of this agreement and shall be released to the Landowners within two weeks upon approval of the Building plans by MPHTJ.
V	Landowner's entitlement	Eighteen per centum (18%) from the total sales value of the Project.
IX	Time for completion of Landowner's houses	Twenty Four (24) months from commencement of constructions.

THE PLAINTIFFS' ENTITLEMENT UNDER JVA

[6] The JVA stipulated the plaintiffs' entitlement in a specific manner. In this respect, cll 3.01, 3.02, and Section V of the First Schedule of the JVA are to be read together.

[7] Firstly — the layout plan for the project is approved by the relevant authority.

[8] Secondly — once the layout plan for the project is approved by the relevant authority, the defendant shall forthwith give notice in writing to the plaintiffs that the layout plan for the project has been approved by the relevant authority.

[9] Thirdly — once the notice in writing is given by the defendant, the plaintiffs shall forthwith select the proposed subdivided building lots that they are entitled to receive and on which the defendant has agreed and undertaken to build the houses on the proposed subdivided building lots in the manner and extent specified in cl 4.4 of the JVA. The selection must first meet the approval of the defendant.

[10] The selection by the plaintiffs shall be 18% from the total sales value of the project. The term 'total sales value' is not defined in the JVA (and the Schedule to the JVA). This court holds that the term 'total sales value' is to be given its ordinary meaning which is the aggregate sum of the sales value for all the units (to be constructed in respect of the project).

[11] It is clear from the bargain struck between the plaintiffs and the defendant that 'the 18% from the total sales value of the project' is from the total sales value at the stage when the layout plan is approved. It is important to note that at this stage ie approval of the layout plan, the units have not been constructed.

[12] The plaintiffs and the defendant did not agree that 'the 18% from the total sales value of the project' is from the total sales value at any other stage including the stage when the units chosen by the 25 plaintiffs are built, or at the stage when vacant possession in respect of the units chosen by the plaintiffs are to be delivered or, importantly, at the stage when the units in the project are sold.

[13] With regard to the plaintiffs' entitlement of 18% of the total sales value of the project, and contrary to the plaintiffs' contention, the plaintiffs and the defendant did not agree and the JVA does not include any provision for the taking of account after all proceeds of sale for the project are received and audited or at whatsoever other stage.

CONTEMPORANEOUS EVENTS

[14] All documents in the Common Bundle of Documents for the trial were classified as documents in Part B. This court is tasked with giving 'effect to the bargain' reached by the plaintiffs and the defendant.

[15] In *Foong Seong Equipment Sdn Bhd (receivers and managers appointed) v Keris Properties (PK) Sdn Bhd and another appeal* [2013] 2 MLJ 361; [2011] 2 AMR 473, the Federal Court held that:

> We agree that it is the court's duty on the interpretation of clauses in an agreement, to give effect to the bargain of the parties according to their intention. Where the bargain is in writing ... the words used ... will have to be looked at unless they are such that one may suspect that they do not convey the intention correctly.

[16] The Court of Appeal in *Mulpha Pacific Sdn Bhd v Paramount Corp Bhd* [2003] 4 MLJ 357 (CA) held that:

> In *The Royal Selangor Golf Club v Anglo-Oriental (Malaya) Sdn Bhd* [1990] 1 CLJ 995, Lim Beng Choon J said:
>
> > In considering the disputes of the parties I must first of all bear in mind the general principles of construction of contract as enunciated in the *National Coal Board v WM Neill & Son (St Helen)* [1984] 1 All ER 555 where it is said at p 560:
> >
> > The first two issues involve the construction of the contract. I bear in mind the principles of construing a contract. The relevant ones for the purpose of this case are: (1) construction of a contract is a question of law; (2) where the contract is

A in writing the intention of the parties must be found within the four walls of the contractual documents; it is not legitimate to have regard to extrinsic evidence (there is, of course, no such evidence in this case); (3) a contract must be construed as at the date it was made: it is not legitimate to construe it in the light of what happened years or even days later; (4) the contract must be construed as a whole, and also, so far as practicable, to give effect to every part of it.

In *Central Bank of India v Hartford Fire Insurance Co Ltd* AIR [1965] SC 7288, the Supreme Court of India lays stress on the second principle advocated in the *Wm Neill & Sons (St Helens) Ltd* case when it says at p 1290:

C Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result.

D

[17] The learned authors of *Chitty on Contracts, General Principles* (30th Ed) stated at para 12–072 that:

E It is not open to the courts to revise the words used by the parties, or to put upon them a meaning other than that which they ordinarily bear, in order to bring them into line with what 20 the courts may think the parties ought to have agreed, or what the court may think would have been a reasonable contract for the parties to make. But, if, from the document itself and the admissible background, the intention of the parties can reasonably be discerned, then the court will give effect F to that intention even though this involves departing from or qualifying particular words used.

[18] The approach taken by this court is also to review and consider and make findings based on the contemporaneous documents/information.

G

[19] In *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 (FC) Chang Min Tat FCJ held at p 234:

H For myself, I would with respect rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings.

I **[20]** Section IV of the Schedule to the JVA stipulated that a sum of RM40,000 as part of the deposit shall be paid upon the signing of the JVA. The payment of this amount is not a live issue.

[21] By a letter dated 22 March 2011, the solicitors for the defendant paid a sum of RM40,000 as the balance of the deposit to the then solicitors for the plaintiffs. A

[22] On 17 February 2012, the Majlis Perbandaran Hang Tuah Jaya approved the layout plans for the project. B

[23] On 28 February 2012, the defendant wrote to the then solicitors for the plaintiffs and informed them that the layout plans for the project were approved by the relevant authority. C

[24] In the letter dated 28 February 2012, the defendant expressly stated that they are writing pursuant to cl 3.02 of the JVA.

[25] Together with the letter dated 28 February 2012, the defendant enclosed 'the proposed price list of the proposed development' and asked that 'the selection must be agreed upon and confirmed as soon as possible'. D

[26] The 'proposed price list of the proposed development' under the column 'Selling Price' listed out the price for each unit. The plaintiffs did not challenge the price for each unit. E

[27] The total amount in the enclosed list was RM24,430,000 (and not RM27,950,000 as pleaded by the plaintiffs — see para 4(b) of the Reply Bundle of Pleadings ('BOP') p 38). The plaintiffs did not challenge the total amount in the enclosed list. F

[28] The plaintiffs admitted that they received the letter dated 28 February 2012. In this respect, reference is made to para 4(a) of the reply (BOP p 37). G

[29] It is crucial to note that the plaintiffs admitted that the plaintiffs selected 13 units (from the proposed subdivided building lots). The admission by the plaintiffs is expressly pleaded in para 4 of the statement of claim (BOP p 9) and then repeated in para 4(c) of the reply (BOP pp 38–39). The admission by the plaintiffs is also set out in para 4 of the statement of agreed facts dated 14 August 2019 (encl 35). H

[30] By a letter dated 18 April 2012 from the defendant to the plaintiffs' then solicitors, the defendant confirmed the plaintiffs' selection of the 13 units. The lot numbers, the name of the plaintiff who made the selection and the type of unit are set out in a table in the letter dated 18 April 2012. I

[31] The defendant's confirmation in the letter dated 18 April 2012 is as required under cl 3.02 of the JVA.

[32] This court finds that as at *18 April 2012*, and as prescribed under the terms and conditions of the JVA, the plaintiffs' entitlement under the JVA was resolved.

[33] There are no contemporaneous correspondence or documents disclosed to this court for the period of more than two years from 18 April 2012 until 11 August 2014.

[34] On *12 August 2014*, the then solicitors for the plaintiffs wrote to the solicitors for the defendant.

[35] In the letter dated 12 August 2014, the solicitors for the plaintiffs raised the issue of the difference of the selling price of the units for the project.

[36] In the letter dated 12 August 2014, the solicitors for the plaintiffs attached two price lists: (a) a document described as 'Senarai Harga A'; and (b) another document described as 'Senarai Harga B'.

[37] 'Senarai Harga A' — the document does not state a total amount. A mathematical computation of the total selling price of units identified in the document can be arrived at. 'Senarai Harga 8' — the document states that the total selling price is RM27,950,000.

[38] By a letter dated 27 August 2014, and in response to the letter dated 12 August 2014, the solicitors for the defendant wrote to the then solicitors for the plaintiffs.

[39] In the letter dated 27 August 2014, the solicitors for the defendant expressly stated that the selection of the plaintiffs' units were concluded. There was no response by the then solicitors for the plaintiffs.

[40] By a letter dated 4 November 2014, the plaintiffs' new solicitors wrote to the defendant.

[41] In the letter dated 4 November 2014, the plaintiffs' new solicitors, claiming to rely on Section IV of the Schedule to the JVA, stated that the defendant 'had not provided [the Plaintiffs] the documentary proof of *actual selling prices* of all the respective units offered for sale to the prospective purchasers/purchasers'.

[42] This court finds that the request by the new solicitors for the plaintiffs is misconceived. With regard to the plaintiffs' entitlement of 18% of the total sales value of the project, the terms and condition of the JVA do not stipulate that the plaintiffs' entitlement is to be determined based on the 'actual selling prices of all the respective units offered for sale to the prospective purchasers/Purchasers'.

[43] By a letter dated 20 November 2014, and in response to the letter dated 4 November 2014, the solicitors for the defendant reiterated that with the selection of the 13 units by the plaintiffs, the determination of the plaintiffs' entitlement had been concluded.

[44] On 5 December 2014, the new solicitors for the plaintiffs wrote to the solicitors for the defendant. In this letter, the new solicitors for the plaintiffs stated that their client was abroad and they would reply with their client's instructions in due course.

[45] On 3 June 2015 (more than one year thereafter), the plaintiffs' previous solicitors wrote to the Pejabat Tanah dan Galian Melaka ('PTG').

[46] In the letter dated 3 June 2015, the plaintiffs' previous solicitors requested from the PTG a 'Senarai Harga Jualan yang telah diluluskan bagi projek tersebut di atas ...'.

[47] By a letter dated 24 June 2015, and in response to the letter dated 3 June 2015, the PTG provided the information requested.

[48] The defendant's position is that at the material time, they were not aware of the correspondence between the previous solicitors for the plaintiffs and the PTG. In this respect, reference is made to para 7 of the amended defence (BOP p 26).

[49] By a letter dated 27 August 2015 (one year later), the previous solicitors for the plaintiffs wrote to the solicitors for the defendant.

[50] In the letter dated 27 August 2015, the previous solicitors for the plaintiffs demanded the plaintiffs' 'entitlement of 18% from the Total Sale Value derived from the above project'.

[51] The demand by the previous solicitors for the plaintiffs is said to be based on cl 3.01(b) of the JVA.

A **[52]** This court reviewed cl 3.01(b) of the JVA. This court finds that cl 3.01(b) must be read with cl 3.02 of the JVA and Section V of the Schedule to the JVA.

B **[53]** When these provisions in the JVA are read together, it is clear that the demand by the previous solicitors for the plaintiffs is misconceived.

C **[54]** This court finds that the words '... all the said hereinafter mentioned ...' (in cl 3.01 (b) of the JVA) does not mean '... after [the Defendant] getting the Building Plan and Developer's License and Advertisement Permit' as contended by the plaintiffs (in the letter dated 27 August 201 5 from their previous solicitors).

D **[55]** This court finds that the words '... all the said approval hereinafter mentioned ...' (in cl 3.01(b) of the JVA) in fact refer to the approval of the layout plan (in cl 3.02 of the JVA).

E **[56]** By a letter dated 4 September 2015, the solicitors for the defendant refuted the (misconceived) demand by the previous solicitors for the plaintiffs.

[57] By a letter dated 7 December 2015, the previous solicitors for the plaintiffs demanded from the defendant the original grant of titles for the 13 units chosen by the plaintiffs.

F **[58]** By a letter dated 7 January 2016, and in response to the letter dated 7 December 2015, the solicitors for the defendant confirmed that the original issue documents of titles were deposited by the defendant with them.

G **[59]** Given the request for the original issue documents of titles, the solicitors for the defendant noted that the plaintiffs have agreed to the earlier selection of the 13 units.

H **[60]** By a letter dated 21 January 2016, and in response to the letter dated 7 January 2016, the previous solicitors for the plaintiffs repeated their request for the grant of titles to the 13 units.

I **[61]** In the letter dated 21 January 2016, the previous solicitors also demanded damages said to be pursuant to cl 6.02 of the JVA.

[62] This court noted that this letter is the first occasion a demand for damages under cl 6.02 of the JVA was made by the plaintiffs against the defendant.

[63] By a letter dated 27 January 2016, and in response to the letter dated 21 January 2016, the solicitors for the defendant informed the previous solicitors for the plaintiffs that they had returned the original issue document of titles in respect of the 13 units and requested the plaintiffs to liaise directly with the defendant for the 13 titles. On the same date, and under cover of a letter also of the same date, the solicitors for the defendant returned the original documents of titles to the defendant.

[64] On 30 March 2016, a document titled 'BORANG F PERAKUAN SlAP DAN PEMA TUHAN' was issued by Lembaga Arkitek Malaysia. The document listed 71 units (70 buildings and 1 pencawang lektrik) and certified that 'bangunan-bangunan itu adalah selamat dan layak untuk diduduki'.

[65] The plaintiffs sought to rely on this document which regard to the plaintiffs' entitlement under the JVA.

[66] This court finds that this document was issued very much later than the stage when 'the layout plan for the project' was approved by the relevant authority which is the triggering event for the computation of the plaintiffs' entitlement under the JVA. The plaintiffs' reliance on this document is thus in error.

[67] In July 2016, the plaintiffs commenced a civil suit against the defendant in CS 22NCvC-33–07 of 2016 ('CS33'). The precursor to Suit 33 was a letter of demand by a different firm of solicitors representing the plaintiffs. The written demand was refuted by the solicitors for the defendant by their letter dated 7 March 2016.

[68] In CS33, the plaintiffs' claim against the defendant was, among others, for the plaintiffs' 18% entitlement under the JVA. However, in CS33, the plaintiffs' pleaded claim was that the total sales value was RM32,151,000 and the plaintiffs' computation of the plaintiffs' 18% entitlement was RM5,787,180.

[69] On 10 February 2017, CS33 was withdrawn by the plaintiff and consequently the court struck out CS33. The withdrawal of CS33 is common ground between the parties.

[70] At the core of the plaintiffs' dissatisfaction is that according to the plaintiffs, there are various 'total sales value' for the project.

[71] The plaintiffs make reference to the following documents:

(a) the document attached to the letter dated 28 February 2012 from the solicitors for the defendant. In this document the amount stated is RM24,430,000;

(b) the two documents attached to the letter dated 12 August 2014 from the previous solicitors for the plaintiff. In the document described as 'Senarai Harga A', the total amount can be computed while in the document described as 'Senarai Harga B', the total amount is RM27,950,000; and

(c) the letter dated 24 June 2015 from the PTG and the selling price stated therein. For completeness, the same information can be seen in a letter dated 7 February 2012 from the PTG.

[72] Given the different amounts, the plaintiffs contend that the 'total sales value of the project' was an amount which was at large. The plaintiffs also contend that the 'total sales value of the project' have to be accounted for before the plaintiffs' entitlement of 18% of the total sales value of the project can be ascertained. Be that as it may, at the trial, the plaintiffs recognised and admitted that the 'total sales value of the project' may differ if computed at different stages of the project.

[73] At the trial, the plaintiffs called a witness (SP2) who according to the plaintiffs was testifying as their expert witness.

[74] SP2 prepared a written report marked as P3(a). In the written report P3(a), SP2 stated that the scope of his engagement was as follows:

> 1. Introduction
>
> The main salient terms and condition of the JVA is that the Landowners will be entitled to 18% of the Gross Development Value of the project from the Developer in return for the right to develop and sel1 units built on the said Land.
>
> We were made to understand that a dispute arose between the Landowners and the Developer with the regards to the selling price of the development units. We were engaged to independently verify the selling price of the said units.

[75] The written report was geared towards 'independently verify the selling price of the units'.

[76] From the outset, it is evident that the terms and conditions of the JVA were misconstrued.

[77] It is important to reiterate that the plaintiffs' entitlement under the JVA is '18% from the total sales value of the Project' and the time to ascertain the total sales value of the project is at the time the layout plans for the project are approved by the relevant authority.

[78] This court finds that as the terms and conditions of the JVA with regard to the plaintiffs' entitlement under the JVA were misconstrued, SP2's scope of engagement was misconceived.

[79] Quite apart from the above, this court also noted that SP2 did not adopt the concepts in the JVA in the written report. For example, the term used in the JVA is 'total sales value' when the term 'Gross Development Value' was used in the written report.

[80] At the trial, SP2 offered an explanation that the term 'Gross Development Value' and 'total sales value' have the same meaning.

[81] This court observes that if that were the case, SP2 could have easily used the term 'total sales value' in the written report. Yet SP2 did not do so.

[82] In the written report, SP2 stated that he did not have access/sight to various documents/information which in his view were necessary for the exercise he undertook for the written report.

[83] Notwithstanding the lack of such documents/information, when SP2 testified at the trial, he testified that he did not make any request for such 'missing' documents/information despite being of the view that such documents/information were necessary to him.

[84] After carrying of investigations which included considering various documents, SP2 concluded the written report by stating:

> 5. Conclusion
>
> We are unable to finalise a quantified sum of the shortfall of the Landowners entitlement due to the limited data and information made available by the Developer resulting in uncertainty in determining the Gross Development Value. Therefore, the sum highlighted in our paragraph 4.1.1 and paragraph 4.5 are qualified subject to further production of all the relevant documents mentioned herein.

[85] This court finds that the written report by SP2 is not of any assistance to this court in considering and arriving at the plaintiffs' entitlement under the

JVA in this action — namely '78% from the total sales value of the Project' which is to be computed when the layout plans for the project are approved by the relevant authority.

[86] On the part of the defendant, the defendant appointed SD1 who prepared a written report (D2). SD1 testified at the trial and was called as an expert on behalf of the defendant.

[87] This court reviewed and considered the written report and the testimony of SD1.

[88] SD1 opined that:

CONCLUSION

(1) The Landowners' entitlement was agreed on 18th April 2012 when they selected the units based on the original proposed Price List of RM25, 290,000.00 (refer Appendix 8) given by the Developer. This proposed price list represents the prevailing market price. The Landowners were aware of this and the Developer proceeded to reconfirm the selected units vide their letter dated 18 April 2012 to MA & Co (refer Appendix 10).

(2) The Joint Venture is not a partnership between the Developer and the Landowners. (Refer Appendix I, Joint Venture Agreement — Article VII 7.01).

(3) The original land area measuring 8.1415 acres has been reduced to 7.7058 acres. As a result, the Landowners' entitlement is adjusted accordingly to 17% computed at 7.7058/8.1415x 18% = 17%.

(4) Furthermore, the hypothesis from the Developer's Auditors' Report also suggested that the SV is RM28,027,127 as at FYE 2018. As such, the SV in 2012 should be much lower.

(5) Based on the valuation above, we conclude that the Landowners' selection of their units reflect the true and best value of their entitlement equivalent to 17% of the value of the SV.

[89] While the written report by SD1 confirmed the plaintiffs' entitlement under the JVA in this action namely '18% from the total sales value of the Project' at the point when the layout plans for the project are approved by the relevant authority, the written report provides little assistance to this court as it also proceeds to also conclude on the plaintiffs' reduced entitlement (see below).

REDUCTION OF THE PLAINTIFFS' ENTITLEMENT

[90] As an alternative defence, the defendant pleaded that the plaintiffs' entitlement was not 18% but rather 17% of the total sales value of the project.

[91] The reduction is naturally denied and opposed by the plaintiffs.

[92] The reasons put forward by the defendant for the reduction are set out and can be seen in a letter dated 7 March 2016 from the solicitors for the defendant to the new solicitors for the plaintiffs.

[93] At the trial, SD2 also testified as to the reasons for the purported reduction of the plaintiffs' entitlement.

[94] This court finds that in the JVA, there are no provisions for any adjustment, whether an increase or a reduction, of the plaintiffs' entitlement. In this respect, this court notes cl 6.04 of the JVA and finds that the provisions of cl 6.04 do not apply.

[95] This court is not with the defendant with regard to their alternative defence.

CLAIM FOR DAMAGES

[96] The plaintiffs pleaded a claim for damages against the defendant for two heads of claim which are:

(a) general damages for late delivery of vacant possession; and

(b) general damages for breach of the JVA by the defendant.

[97] Clause 6.02 of the JVA stipulated that:

> Clause 6.02 of the JVA stipulated that:
>
> If the Developer shall fail to complete the Landowner's houses and deliver the same to the Landowner within the said period in Section IX of the First Schedule from the date of commencement of construction works unless the completion of the same by that date is prevented as result of unforeseen contingencies aforementioned, the Developer hereby agrees with the Landowner that the Developer shall pay to the Landowner damages.

[98] On the facts of this case, there is no material before this court that there were 'unforeseen contingencies aforementioned'.

A **[99]** Clause 6.02 of the JVA is to be read with Section IX of the First Schedule of the JVA. Section IX stipulated that:

> Time for completion of Landowner's houses — Twenty Four (24) months from commencement of constructions.

B **[100]** There is no material before this court as to the date of the 'commencement of constructions'.

[101] Therefore, the computation of the time period in Section IX of the First C Schedule of the JVA cannot be undertaken by this court.

[102] The JVA also does not provide a formula for the computation of damages under cl 6.02 of the JVA.

D **[103]** This court noted that at the stage of written submission (and not at the trial), an attempt was made to use a formula which appeared similar to the formula for the computation of damages for late delivery under the Housing Development (Control and Licensing) Act 1966.

E **[104]** This court is of the view that the use of such formula is incorrect and is not prescribed under the terms of the JVA.

[105] The law with regard to a claim for damages is settled. In *Popular* F *Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 at p 369, Edgar Joseph Jr J (as he then was) held that:

> In this context, I am reminded of Lord Goddard's dictum in *Bonham-Carter v Hyde Park Hotel* quoted with approval by Thompson CJ in *Lee Sau Kong v Lau Cheng* G *Chiang*, namely, that:
>
> > Plaintiffs must understand that if they bring actions for damages *it is for them to prove their damage; it is not enough to write down the particulars*, and so to speak, throw them at the head of the court, saying, 'This is what I have lost, I ask you to give me these damages'. *They have to prove it.* (Emphasis added.)

H **[106]** The burden is on a plaintiff, to prove on a balance of probabilities, that the plaintiff suffered the damage complained of and the quantum of such damage.

I **[107]** In this case and at the trial, the plaintiffs did not call or tender any evidence, whether oral or documentary, regarding the plaintiffs' claim for damages.

[108] This court finds that the plaintiffs have not discharged the legal burden on them and have not established their claim for damages against the defendant.

DECISION OF THIS COURT

[109] The plaintiffs pleaded the following relief in the statement of claim:

Tuntutan Dan Relief

Oleh itu, Plaintif-Plaintif memohon untuk relief-relief seperti berikut:-

(a) Satu deklarasi bahawa Defendan adalah bertanggungjawab untuk memberi akaun yang lengkap dan sempurna ke atas segala hasil jualan projek perumahan bercampur di atas tanah yang dikenali sebagai Lot 2833, PM 102, Mukim of Ayer Panas, District of Jasin, State of Melaka (selepas ini dirujuk sebagai 'Projek tersebut') terhadap Plaintif-Plaintif;

(b) Satu akaun atas jumlah yang perlu dibayar oleh Defendan kepada Plaintif-Plaintif berkenaan dengan hasil jualan projek perumahan bercampur;

(c) Satu Perintah bahawa Defendan perlu membuat bayaran kepada Plaintif-Plaintif untuk jumlah wang yang terhutang dan perlu dibayar atas pengambilan akaun sepertimana yang dinyatakan di alas;

(d) Satu Perintah bahawa Defendan perlu menyerahkan milikan kosong ke atas 13 unit hartanah (termasuk rumah) yang telah dipilih oleh Plaintif-Plaintif dan dipersetujui oleh Defendan;

(e) Satu Perintah supaya Defendan memindahmilik 13 unit hartanah (termasuk rumah) yang mana hakmilik individu telahpun dikeluarkan;

(f) Gantirugi am untuk kelewatan penyerahan milikan kosong;

(g) Gantirugi am atas kemungkinan Perjanjian tersebut oleh Defendan;

(h) Faedah pada kadar 5% setahun ke atas gantirugi-gantirugi am sepertimana yang dinyatakan di perenggan 17(g) dan (h) di atas dari tarikh pemfailan writ saman ini sehingga tarikh penyelesaian penuh;

(i) Faedah pada kadar 5% setahun ke atas segala jumlah hasil jualan Projek tersebut (jika ada) di mana Defendan adalah bertanggungjawab kepada Plaintif-Plaintif dari tarikh pemfailan Writ saman ini sehingga tarikh penyelesaian penuh;

(j) Kos; dan

(k) Relif-relif lain dan/atau selanjutnya yang dianggap wajar dan saksama oleh Mahkamah Yang Mulia ini.

[110] On 30 December 2020, and on the totality of the evidence, both documentary and oral, prayers (a), (b), (c), (f), (g), (h) and (i) of the statement

of claim were not allowed while prayers (d) and (e) of the statement of claim were allowed. This court also ordered that costs in the sum of RM20,000 shall be paid by the plaintiffs to the defendant.

Claim allowed in part.

Reported by Nabilah Syahida Abdullah Salleh